

**WEST VIRGINIA PUBLIC EMPLOYEES  
GRIEVANCE BOARD**

**SYNOPSIS REPORT**

**Decisions Issued in June 2015**

The Board's monthly reports are intended to assist public employers covered by a grievance procedure to monitor significant personnel-related matters which came before the Grievance Board, and to ascertain whether any personnel policies need to be reviewed, revised or enforced. W. Va. Code §18-29-11(1992). Each report contains summaries of all decisions issued during the immediately preceding month.

If you have any comments or suggestions about the monthly report, please send an e-mail to [wvgb@wv.gov](mailto:wvgb@wv.gov).

NOTICE: These synopses in no way constitute an official opinion or comment by the Grievance Board or its administrative law judges on the holdings in the cases. They are intended to serve as an information and research tool only.

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### DEPARTMENT OF EDUCATION EMPLOYEES

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<b><u>KEYWORDS:</u></b>	Insubordination; immorality; inappropriate sexual comments; unwanted advances; sexual harassment; progressive discipline; hearsay; improvement plan; mitigation; disrespectful letter
<b><u>CASE STYLE:</u></b>	<u>Lippold v. Department of Education/Schools for the Deaf and the Blind</u> DOCKET NO. 2015-0519-DOE (6/17/2015)
<b><u>PRIMARY ISSUES:</u></b>	Whether Respondent proved the charges of sexual harassment, constituting immorality, and insubordination, and whether Grievant demonstrated that the discipline imposed was clearly excessive.
<b><u>SUMMARY:</u></b>	Grievant was dismissed from his employment for immorality, in the form of sexual harassment, and insubordination. Grievant made a number of extremely inappropriate comments of a sexual nature to female co-workers and others at the workplace, and pulled a co-workers shirt out after commenting on her breasts. Grievant denied the allegations against him and asserted that all these women were lying. Grievant also wrote a disrespectful and disturbing letter to his retiring principal. Respondent proved the charges against Grievant and demonstrated that Grievant should not be returned to the workplace.

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<b><u>KEYWORDS:</u></b>	Insubordination; unprofessional behavior; suspension
<b><u>CASE STYLE:</u></b>	<u>Carr v. McDowell County Board of Education</u> DOCKET NO. 2015-0593-McDED (6/18/2015)
<b><u>PRIMARY ISSUES:</u></b>	Whether Respondent's one-day suspension of Grievant for insubordination for continued unprofessional behavior was reasonable.
<b><u>SUMMARY:</u></b>	Grievant, a teacher's aide, was suspended for one day for repeated unprofessional conduct and insubordination. Respondent proved that Grievant was insubordinate when she repeatedly engaged in unprofessional behavior, was counseled and reprimanded for unprofessional behavior, was warned she would be disciplined if her unprofessional behavior continued, and that the unprofessional behavior did continue. Respondent's one-day suspension of Grievant for insubordination for continued unprofessional behavior was reasonable. Accordingly, the grievance is denied.

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<b><u>KEYWORDS:</u></b>	Summer Positions; Posting; Next in Line; Most Senior Employee; Grass Mowing Jobs
<b><u>CASE STYLE:</u></b>	<u>Thompson v. Wayne County Board of Education</u> DOCKET NO. 2014-1593-WayED (6/18/2015)
<b><u>PRIMARY ISSUES:</u></b>	Whether Grievant established that the practice of Respondent employing two individuals with no contractual relationship with the Respondent to cut the grass at two of its schools and two classroom teachers to cut grass at two of its other schools was contrary to law.
<b><u>SUMMARY:</u></b>	Respondent employed two individuals with no contractual relationship with the Respondent to cut the grass at two of its schools and two classroom teachers to cut grass at two of its other schools. Respondent concedes error and recognizes the need to comply with the provisions of West Virginia Code § 18A-4-8b in posting and filling these summer positions. Respondent was given notice of the deficiencies before the beginning of the summer and had within its power the process to answer the question of who would have received the positions. Respondent declined to do so. Respondent cannot now use that uncertainty as a shield to its improper actions in an attempt to create doubt as to the appropriate relief in the case by refusing to post the grass mowing jobs. Grievant is entitled to relief based upon the unique circumstances of this case.

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<b><u>KEYWORDS:</u></b>	Duty Officer Rotation; On-Call; Overtime; Policy; Emergency Call; Compensation
<b><u>CASE STYLE:</u></b>	<u>Bolen, et al. v. Division of Highways</u> DOCKET NO. 2014-1577-CONS (6/5/2015)
<b><u>PRIMARY ISSUES:</u></b>	Whether Grievants are entitled to compensation for the time they are on call or are entitled to be removed from the on-call list.
<b><u>SUMMARY:</u></b>	Grievants are Transportation Crew Supervisors I and are required to serve as one of eight duty officers on a weekly on-call list to respond to emergencies. Grievants failed to prove that Respondent has violated law or policy in requiring them to serve on the on-call list. Grievants are not entitled to compensation for the time spent on call. Grievant failed to prove that Respondent is required to adopt a policy or procedure governing the duty officer on-call list or that Respondent is required to add the county administrator to the list. Accordingly, the grievance is denied.

**KEYWORDS:** Aggressive Attack; Physically Abuse a Resident; Child Care Setting; Child Abuse; Job Duties

**CASE STYLE:** Brammer v. Division of Juvenile Services/Gene Spadaro Juvenile Center

DOCKET NO. 2015-0913-CONS (6/15/2015)

**PRIMARY ISSUES:** Whether Respondent proved that Grievant abused a resident in the juvenile center while attempting to restrain him.

**SUMMARY:** Grievant was suspended pending an investigation of an incident wherein he was involved in the restraint of a resident at the juvenile correctional facility. Two investigations of the incident were simultaneously conducted by Respondent and the Child Protective Services ("CPS") section of the West Virginia Department of Health and Human Resources ("DHHR"). Respondent's investigator concluded that Grievant violated DJS Policy 138 section 2 (kk) "physical abuse of a resident," and section 2 (zz) "Conduct unbecoming of a Division of Juvenile Services employee," by striking a resident while the resident was in a "prone/fetal position" on the bed. The blow caused a contusion to the resident's head above his right eye. The DHHR-CPS investigator found that Grievant committed child abuse by causing physical harm to a juvenile in his custody. Grievant was dismissed from employment as a result of these findings.

Grievant contends that he delivered a straight arm punch to the resident after the resident struck him, which he contends was consistent with defense protocols trained by the DJS. Respondent proved the allegations against Grievant by a preponderance of the evidence. Further, Respondent dismissed Grievant because it could not continue to employ him as an officer in the juvenile facility after he was found to have committed child abuse of a resident. Consequently, the grievance is DENIED.

**KEYWORDS:** Dismissed; Jurisdiction; Pay Increase; Circuit Court Order; Pay Grade; Hartley

**CASE STYLE:** Whitmore v. Department of Health and Human Resources/Mildred Mitchell-Bateman Hospital and Division of Personnel  
DOCKET NO. 2015-0858-DHHR (6/9/2015)

**PRIMARY ISSUES:** Whether the Grievance Board has jurisdiction to hear this matter.

**SUMMARY:** Grievant is employed as a nurse practitioner by Respondent DHHR at Mildred Mitchell-Bateman Hospital. Grievant's salary was increased in January 2015 as a result of action taken in an on-going civil action now pending before the Circuit Court of Kanawha County, West Virginia, and/or in accordance with West Virginia Code § 5-5-4a. However, Grievant's salary was increased to the maximum level allowed by Respondent DOP for her pay grade, and not the market rate salary for a nurse practitioner. Grievant alleges violations of the Circuit Court order. The Grievance Board lacks jurisdiction to enforce a Circuit Court order. Further, West Virginia Code § 5-5-4a specifically exempts pay increases granted pursuant thereto from the grievance process. Therefore, Respondent DHHR's Motion to Dismiss should be granted, and this grievance, DISMISSED.

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**KEYWORDS:** P-Card Expenditures; Fraudulent Charges; Gross Misconduct; Due Process; State Spending Unit; Ethical Standards; Use of Public Office for Private Gain; Public Contracts

**CASE STYLE:** Smith v. Division of Natural Resources  
DOCKET NO. 2015-0185-DOC (6/15/2015)

**PRIMARY ISSUES:** Whether Respondent has demonstrated by a preponderance of the evidence that the dismissal of Grievant was for good cause.

**SUMMARY:** Grievant was terminated from his employment with the West Virginia Division of Natural Resources. Respondent avers that Grievant misused his public position evading recognized bidding procedures; had direct or indirect personal interest in contracts he awarded and conspired to cause the state to pay a higher price for equipment and services. Grievant alleges his dismissal lacked just cause and due process. Respondent has met its burden of proof in this case by a preponderance of the evidence and demonstrated that Grievant engaged in gross misconduct. This grievance is DENIED.

**KEYWORDS:** Mandatory Transfer; Unit Assignment; Reprisal; Retaliation

**CASE STYLE:** Thomas-Ree v. Department of Health and Human Resources/William R. Sharpe, Jr. Hospital

DOCKET NO. 2014-0773-DHHR (6/10/2015)

**PRIMARY ISSUES:** Whether Grievant established that the reasons given by her employer for changing her unit assignment after using the grievance procedure was a pretext for retaliation.

**SUMMARY:** In December 2013, Grievant and a co-worker were moved from their shared unit to different units in the hospital because of conflict between each other. Respondent asserts that both employees were moved to avoid the appearance of favoritism. Grievant asserts that she was moved in retaliation for a previous grievance she had filed. Grievant established by a preponderance of the evidence that Respondent's justification for moving her to another unit involved a pretext for prohibited retaliation. Accordingly, Respondent is ordered to place Grievant back to Unit C2.